(1806) 2 Bos. & P.N.R. 335, *per* Mansfield C.J. As was said by Lord Hodson in *Lewis* v. *Daily Telegraph* [1964] A.C. 234, 271 'the literal meaning of the words, even of such simple phrases as 'X is a thief', does not carry one very far, for they may have been spoken in play or other circumstances showing that they could not be taken by reasonable persons as imputing an accusation of theft."

In the instant case, I have already pointed out that it is not possible for the word "cheat" to impute the crime of cheating the club. The words "dishonest" and cheat" were understood by Mr. Tiong thus: "Normally when people argue in the clubhouse many of [this] type of words are used. There was an exchange of words between the plaintiff and the defendant. The defendant uttered the words 'dishonest' and 'cheat' as he walked away. The defendant uttered the words in anger." "To those who so understand them they do not convey any defamatory imputation": *Gatley* on Libel and Slander, 8th ed. para. 109. They were spoken as words of general abuse.

The appeal of the defendant against the judgment of the President in favour of the plaintiff was, therefore, allowed.

Appeal allowed.

Solicitors: *Suppiah & Singh; Tan & Tan.*

ATHAPPEN a/l ARUMUGAM v. MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

[O.Cr. J. (Edgar Joseph Jr. J.) May 13 & 19, 1983, July 4, 1983]

[Penang – Criminal Application No. 1 of 1983]

Criminal Law & Procedure – Detention order – Application for habeas corpus – Whether order of detention of Minister open to judicial review – Emergency (Public Order and Prevention of Crime) Ordinance, 1969, s. 4(1).

Administrative law – Detention order – Application for habeas corpus – Whether order of detention of Minister open to judicial review – Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1).

This was an application for *habeas corpus* to decide the following issue: "whether, and if so, to what extent the order of detention of the Minister for Home Affairs under the provision of section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, is open to judicial review".

The applicant was detained under an Order for Detention, "necessary for the purpose of preventing him from acting in any manner prejudicial to public order, or that it is necessary for the suppression of violence or the prevention of crimes involving violence". The applicant was alleged to be a member in an Indian Secret Society which was active in the York Road area, Penang. He was alleged to have committed criminal activities like criminal intimidation and damaged property in 1982 and 1983.

Held, dismissing the application: (1) the subjective satisfaction of the Minister to detain a subject is not open to judicial review;

(2) the vagueness etc. of the allegations of fact upon which a detention order is based does not relate back to the order of detention thereby vitiating it;

(3) the mere fact that a subject has been detained under the law as to preventive detention following his acquittal in a Criminal Court does not *ipso facto* render his detention wrongful;

(4) exceptionally, the courts will review the order for preventive detention if:

(a) *mala fides* is alleged; or,

(b) it is alleged that the grounds of detention stated in the order do not fall within the scope and ambit of the relevant legislation; or,

(c) it is alleged that a condition precedent for the making or the continuance of the order of preventive detention has not been complied.

Cases referred to:

(1) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129.
(2) *Tan Boon Liat* v. *Menteri Hal Ehwal Dalam Negeri & Ors.* [1977] 2 M.L.J. 108.
(3) *Jacobs* v. *London County Council* [1950] A.C. 361.
(4) *The Mostyn* [1928] A.C. 57.
(5) *Dwarka Das* v. *State of Jammu & Kashmir* A.I.R. 1957 S.C. 164.
(6) *Jagannath Misra* v. *State of Orissa* A.I.R. 1966 S.C. 1140.
(7) *Ram Manohar* v. *State of Bihar* A.I.R. 1966 S.C. 740.
(8) *Yeap Hock Seng* v. *Minister of Home Affairs, Malaysia* [1975] 2 M.L.J. 279, 282.

CRIMINAL APPLICATION.

K. Balasundram for the applicant.

Zaki bin Tun Azmi (Deputy Public Prosecutor) for the respondents.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This application for *Habeas Corpus* raises the familiar question: Whether, and if so, to what extent the order of detention of the Minister for Home Affairs under the provisions of section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 ("the Ordinance"), is open to judicial review.

The Order for Detention, the Grounds and the Allegations of Fact, shorn of formal parts were in the following terms:

"ORDER FOR DETENTION

Whereas I, Minister of Home Affairs, am satisfied that this Order, made on the person named below is necessary for the purpose of preventing him from acting in any manner prejudicial to public order, or that it is necessary for the supression of violence or the prevention of crimes involving violence.

Name	*N.R.I.C.*
ATHAPPEN s/o M. ARUMUGAM	3972582

In pursuance of the powers conferred on me under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, I hereby by this Order, direct that the abovenamed person be detained for a period of one year commencing from April 19, 1983, at the Rehabilitation Centre, Pulau Jerejak, or at any other place as directed by me from time to time.

GROUNDS ON WHICH THE DETENTION ORDER IS MADE:

You are a member of an Indian Secret Society which has committed criminal activities of a violent nature and prejudicial to public order.

ALLEGATIONS ON WHICH THE ORDER IS BASED:

You are a member in an Indian Secret Society which is active in the York Road area, Pulau Pinang. You have committed criminal activities like criminal intimidation and damaged property in the years 1982 and 1983."

The substantial paragraph in the affidavit of the Applicant's brother affirmed to on May 4, 1983 is paragraph 5, which contains the Grounds in support of the application ("Grounds (a), (b), (c) & (d)," respectively) reads as follows:

"5. I am advised by the Applicant's solicitors and verily believe that the said order of detention dated April 19, 1983 and made under the hand of the 1st Respondent is not accordance with law and is also in contravention of the provisions of Article 151(1)(a) of the Federal Constitution in that:-

(a) one of the grounds on which the said order of detention was made is irrelevant and contrary to the objects and purposes of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969;

(b) the allegations of fact on which the said order of detention is based is irrelevant to the Applicant having acted in any manner prejudicial to public order;

(c) the allegations of fact supplied to the Applicant are vague, insufficient and irrelevant so as to constitute a denial of the Applicant's right to make representations against the order of detention;

(d) generally, the 1st Respondent has not applied his mind to nor considered adequately the necessity for the Applicant's detention."

The two affidavits in answer were affirmed to by one Encik Musa bin Muhamad on May 10, 1983 and on May 11, 1983 and read, respectively, as follows:

"1. I am the Penolong Setiausaha at the Kementerian Hal Ehwal Dalam Negeri. I am the officer responsible for the case against the said Athappen a/l M. Arumugam (hereafter referred to as the said detainee) and for obtaining the decision of the Minister in respect thereto.

2. I crave leave to refer to the affidavit of PURUSAMY a/l ARUMUGAM affirmed at Penang on May 4, 1983 (hereafter referred to as the said affidavit.

3. The Minister of Home Affairs YAB Dato' Musa Hitam had personally made the decision against the said detainee after considering the facts of the case.

4. The said detainee had previously been detained at Muar Rehabilitation Centre for a period of six months from September 9, 1981 under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, that is the same provisions under which he is presently detained.

5. Since his release in March 1982, on his return to Pulau Pinang he had again become a member of an unlawful Indian gang in the area of York Road, Pulau Pinang and had committed acts involving violence such as extortion and destruction of property.

6. The order of detention is made against him in order to prevent him from continuing to commit crimes involving violence which are prejudicial to public order.

7. I deny the allegations stated in paragraph 5 of the said affidavit.

8. I pray that the application be dismissed."

"1. I crave leave to refer to my affidavit affirmed and signed at Kuala Lumpur May 10, 1983.

2. In furtherance to paragraphs 1 and 3 of my said affidavit I am to state that as the officer in charge of the case, I studied the case file against the Applicant and prepared a summary of the contents, for the Minister, drawing his attention to important aspects of the case for and against the Applicant. The case file against the Applicant is submitted together with my minute to the Minister. To the best of my knowledge and experience, the Minister reads the minute and if he considers necessary he would read the contents of the file or would call up for further particulars before making a decision.

3. The details of the allegations of facts against the Applicant cannot be disclosed to him as it may lead to the identification of the informant whose identity must be protected."

Mr. Balasundaram said he was confining his submission to Grounds (a), (b) and (c) and that he would argue ground (c) first and next grounds (a) and (b) which he would take together.

Mr. Balasundaram then suggested that ground

(c) gave rise to two issues:

1st issue: Whether the issue of relevancy and sufficiency is justiciable?

2nd issue: If so, are the Allegations of Fact so vague as to amount to a denial of the detainee's right to make representations?

On the first issue, Mr. Balasundaram submitted that *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri*[1] was in fact no authority for the proposition that vagueness of allegations of fact is not justiciable. Alternatively, that if it was authority for this proposition then it was no longer good law as the Federal Court in a later decision, namely, *Tan Boon Liat* v. *Menteri Hal Ehwal Dalam Negeri & Ors.*[2] had refused to follow it.

As to his primary submission, Mr. Balasundaram urged that in *Karam Singh,* Suffian F.J. (as he then was) who delivered the principal judgment, was the only judge who considered the issue of justiciability. In support, he referred to a passage in the judgment of Ong Hock Sim, F.J., in *Tan Boon Liat* where the learned judge said this:

"... In *Karam Singh* (cit) only the present Lord President (then Federal Judge), as one of the five judges, referred to certain Indian cases which stressed the provisions to be followed in preventive detention cases as laying down matters substantially procedural in nature. I should point out that this point was not referred to or considered by any of the other four judges; it was not the *ratio decidendi* of the judgment of Suffian F.J. (as he then was) – far from it. The *ratio decidendi* common to all five judgments was that there were no merits whatsoever in that appeal."

It is necessary to identify the *ratio decidendi* in *Karam Singh,* a task which is not free from difficulty since although the decision was unanimous there were several judgments. In performing this task I have kept in the forefront of my mind two guiding principles which may be stated thus:

1. Where a case is argued on several grounds and the Judge declares that he is deciding the case on more than one ground, each proposition on which he bases the decision will qualify as a *ratio: Jacobs* v. *London County Council*[3] .

2. It may happen in an Appeal Court that all the Judges concur on the decision but each one gives different reasons for it. In such a situation, the only safe course is to follow the salutary advice of Lord Dunedin in *The Mostyn*[4], who said that if it is not clear what the *ratio decidendi* was, then it is not part of a later tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it.

The judgment of Suffian F.J. was the longest and contained detailed reasons for rejecting each of the grounds put forward on behalf of the detainee. It also concluded with a summary of his opinions which included the following passages:

"In any event, it is not for the court to judge the vagueness, sufficiency or relevance of the allegations of fact on which an order of detention is based. It is for the executive to do so.

The law here is different from that in India."

In my opinion, as Suffian F.J. had made it clear that he was deciding the case on more than one ground, each proposition on which he based his decision may be rightly regarded as the *ratio decidendi* of his judgment. Accordingly, the proposition that the subjective satisfaction of the Minister in cases of preventive detention is not justiciable, qualifies as one of the *ratio decidendi* of his judgment.

I propose next to analyse the judgments of the other four judges.

This is what Azmi, L.P. said at p. 140 col. 1 para 1 to col. 2 para C:

"As to the arguments that the allegations of fact supplied were vague, insufficient and irrelevant, that they prevented the appellant from availing himself of the opportunity of asking the representations and so on, I agree with what my learned brother Suffian F.J. states in his judgment (at pp. 148 et seq. post) and I have nothing to add.

Finally I wish to quote the following from the judgment of Lord Macmillan in *Liversidge* v. *Sir John Anderson & Anor.* at page 253:-

> "But how could a court of law deal with the question whether there was a reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, not of fault? A decision on this question can manifestly be taken only by one who had both knowledge and responsibility which no court can share."

And further down at page 254 he said this:

"The question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence."

And this is what Ong C.J. said at p. 141 col. 1 para D:

"Like my brother Suffian I have the invidious task of electing whether to give more weight to English or Indian decisions in preference to the other. In this appeal we are of the same mind."

and at p. 141 col. 1 para G & H he said this:

Perusing both English and Indian authorities has been no small task, but at the end of it all I would sum up by saying that, in my humble opinion, English courts take a more realistic view of things, while Indian judges, for whom I have the highest respect, impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers."

and at p. 141 col. 1 para I he said this:

"Paraphrasing what was said by Lord Macmillan in *Liversidge* v. *Anderson* (at p.258), in my opinion, production by the respondent Minister of an order of detention by him, *ex facie* regular and duly authenticated, constitutes a peremptory defence to any complaint of unlawful detention and places on the complainant the burden of establishing that the order is unwarranted, defective or otherwise invalid."

And this is what Gill F.J. (as he then was) said at p. 154 col. 2 paragraphs B to E:

"There is ample authority for the proposition that it is not the function of the court to act as a court of appeal from the discretionary decision of the Cabinet and to inquire into the grounds upon which they came to the belief that it was necessary or desirable in the interests of the security of Malaysia to hold the appellant in detention (see *The King* v. *Secretary of State for Home Affairs, Ex parte Lees*). As was stated by Lord Atkinson in *Rex* v. *Halliday*, it must not be assumed that the powers conferred upon the executive by the statute will be abused. His Lordship went on to say (at page 275):-

> "And as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof."

With respect, I agree."

And Ali, F.J., after pointing out at p.156 col.2 C that since 1957 certain Indian decisions have opened up new grounds for challenging the validity of orders of detention, namely, *Dwarka Das* v. *State of Jammu & Kashmir*[5], *Jagannath Misra* v. *State of Orissa*[6] and *Ram Manohar* v. *State of Bihar*[7], then said this at p.157 col.2 E:

"The question is whether these new grounds which I have mentioned should be imported into this country. It is a difficult question to answer, but nevertheless one that must be answered. Speaking for myself, I prefer to adopt certain minority views expressed in some of the Indian cases which reject these new grounds as being inconsistent with the subject theory."

and still later at p.159 col.1 paragraphs C & D he said this:

"In this connection, I shall be content to say that in habeas corpus proceedings, such as this, the court is not concerned with the truthfulness or otherwise of the allegations because the question whether it is necessary that a person be detained under section 8(1)(a) of the Internal Security Act, 1960, is a matter for the personal or subjective satisfaction of the executive authority. Accordingly, no consideration can be given to the appellant's denial and no opinion need be expressed on his contentions."

In my view, the passages from the various judgments reproduced above compel me to the inevitable conclusion, that each of the learned judges who comprised the court in *Karam Singh* did in fact consider the question of justiciability, either expressly or implicitly, though with varying degrees of emphasis and detail, and each of them decided that question against the detainee.

The primary submission on the first issue which arises from Ground (c) is therefore rejected.

Turning to Mr. Balasundaram's alternative argument on the first issue, he submitted that *Karam Singh,* assuming it held that the order of the Minister under section 8 of the *Internal Security Act* was not justiciable, was no longer good law as the Federal Court in *Tan Boon Liat (supra)* had refused to follow it, and in support reliance was placed on the following passage in the judgment of Lee Hun Hoe, C.J. (Borneo) at p.114 col.1 paragraph B *et seq*:-

"The word "procedure" in Article 21 of the Indian Constitution has been interpreted to require strict compliance with procedural requirements which is not required by our Article 5. The Indian Courts have relied on Article 21 to see that the executive states clearly which of the grounds for detention specified in the statute are in fact applicable to a particular detenu. The requirement to provide sufficient particulars is to enable a detenu to properly present his case. The requirement is derived from the statute and is not a procedure laid down by Article 21. Our Article 151 and various sections of the Ordinance prescribe limitations on the rights given by Article 5. If the provisions of Article 151 and the various sections of the Ordinance are complied with then the arrest and detention will be lawful even though they infringe personal liberty because the arrest and detention will be in accordance with law.

For myself I find it difficult to see how our Article 5 could be interpreted to exclude the question of procedure even though there is no mention of procedure. The exclusion of procedure is merely an inference drawn from the remarks of Suffian F.J. in *Karam Singh's case.* He was merely pointing out the difference in the wordings of the Indian Constitution and our Constitution. He did not say that procedure was not part of the law. I am inclined to agree with Encik Karpal Singh's contention that the expression "in accordance with law" in Article 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression "in accordance with law" were to be construed as to exclude procedure then it would make nonsense of Article 5."

It is true that the above passage expresses an opinion opposite to that of Suffian F.J. in *Karam Singh* (at p.150 col.2 para H) on the question whether there is any material difference between Article 21 of the Indian Constitution and the equivalent provision in our Constitution, namely, Article 5. But, with respect, I do not read this conflict of judicial opinion as meaning that the Federal Court in *Tan Boon Liat* had refused to follow *Karam Singh* on the question of justiciability. I say so because this conflict concerned a point which merely constituted one of three reasons Suffian, F.J. gave for refusing to follow the Indian decisions (see pp.150 col.2 para 9 to 151 col.1 para E). The other two reasons being that in India the power to detain was exercisable by mere civil servants whose actions required supervision by the courts whereas here the power was exercisable by the highest authority, namely, the Yang di Pertuan Agong acting on Cabinet advice; next, here, a detainee had not only two entitlements as in India, namely –

(1) to be informed of the grounds for his detention; and

(2) to be given an opportunity of making representations against the order of detention;

but also other entitlements, not available to a detainee in India, namely,

(3) to be informed of the allegations of fact on which the order is based, article 151(1)(a) and section 11(2)(a)(ii) of the Act;

(4) to be furnished in writing with a statement of such other particulars, if any, as he may, in the opinion of the Minister, reasonably require in order to make his representations against the order, section 11(2)(b)(iii) of the Act; and

(5) to be furnished with additional particulars under section 11(2)(iii) of the Act if he felt handicapped by the vagueness, insufficiency or irrelevancy of allegations of fact on which the detention order is based.

Furthermore, Suffian L.P. who was also a member of the court in *Tan Boon Liat's case* was careful to distinguish *Karam Singh's case,* and, if I may be pardoned for saying so, correctly, when he said:

"It is true that in *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* with reference to Article 5(1) which reads:-

"No person shall be deprived of his ... personal liberty save in accordance with law"

I drew a distinction between law and procedure and said in effect that the courts will take a serious view of failure to comply with substantive law but not of failure to comply with procedural law. But here the provision breached is not just procedural, but in my opinion substantive. In *Karam Singh* after the order of detention had been made against him, the Minister was required to do certain things, which Mr. Karam Singh complained the Minister had not done. Here, on the other hand, the condition for the detention of the appellants after the period of three months is fundamental; that condition had to be satisfied *before* the order could be made; it was condition precedent. Before the appellants could be further detained beyond three months the Board must have made recommendations on their representations. That condition precedent has not been satisfied and in my judgment their continued detention after that period was therefore unlawful, since it was not, in the words of Article 5(1), "in accordance with law".

The alternative submission on the first issue which arises from Ground (c) is accordingly also rejected.

It follows, therefore, that since I find the issue of relevancy and sufficiency is not justiciable, it is unnecessary to rule on the various arguments advanced on behalf of the Applicant in support of the second issue arising from Ground (c) which, it will be recalled, raised the question whether the allegations of fact were so vague as to amount to a denial of the Applicant's right to make representations.

I shall now proceed to consider Ground (a) which, it will be recalled, alleges that one of the grounds on which the said order of detention was made is irrelevant and contrary to the objects and purposes of the Ordinance.

"The Court," said Abdoolcader, J. (as he

then was) in *Yeap Hock Seng* v. *Minister of Home Affairs, Malaysia*[8], "cannot be invited to undertake an investigation into the sufficiency of the matters upon which the satisfaction of the minister purports to be grounded but can examine the grounds disclosed by the minister to see that they are relevant to the object which the Ordinance prescribes."

It is with the above proposition in mind that I have to consider the submissions made on behalf of the Applicant as regards this part of the case.

Section 4(1) of the Ordinance provides in explicit terms the purposes or objects for which an order for detention may be made and is in the following terms:

"4. (1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order directing that that person be detained for any period not exceeding two years."

It was submitted that one of the purposes mentioned in the order is outside the scope of section 4 of the Ordinance. Specifically, it was urged that the words "and prejudicial to public order" are illusory in the sense that they are not supported by the Allegations of Fact contained in the statement accompanying the order. It was further urged that the Allegations of Fact may support the contention that he was acting in breach of ordinary law and order as opposed to acting in a manner prejudicial to public law and order which is a requirement of section 4(1) of the Ordinance.

With respect, I find that this argument suffers from confusion of thought since it is quite wrong to say that the words "and prejudicial to public order" are illusory because they are not supported by the Allegations of Fact. The point that the Allegations of Fact suffer from any defect whether by the inclusion of irrelevant material or the omission of relevant material is wholly alien to the question whether the grounds for detention disclosed by the Minister were outside the scope and ambit of the purposes for which a detention order under section 4(1) of the Ordinance could be made. It is obvious that the grounds disclosed followed meticulously the wording of section 4(1) of the Ordinance and were thus clearly within its objects. Once these matters are borne in mind the Applicant's entire argument as regards this part of the case loses its sting since "the court cannot be invited to undertake an investigation into the sufficiency of the matters upon which the satisfaction of the Minister purports to be grounded" (per Abdoolcader, J. in *Yeap Hock Seng's case*). It follows, therefore, that it is unnecessary to consider the Applicant's submission whether one irrelevant ground, coupled with other relevant grounds, can render the Order for Detention invalid. Nor for that matter do I find it necessary to rule on the Applicant's further submission in support of Ground (b) that the Allegations of Fact "amounted to breaches of ordinary law and order but were not prejudicial to public law and order." However, had it been necessary to do so, on the ground that an order for detention which is the result of considerations outside the scope and ambit of the Ordinance is vitiated by *mala fides*, I would have had no hesitation in deciding this question against the Applicant. As Encik Zaki who appeared for the Respondent, rightly put it, the criminal conduct attributed to the Applicant, namely, criminal intimidation and damage to property were in a specified locality, namely, the York Road area, Pulau Pinang, over a period of time, namely, 1982-83, not merely in his capacity as an individual but as a member of a secret society. Now, the activities of secret societies in this country are, I think, sufficiently notorious for me to take judicial notice of and there is the further fact that the Applicant was the subject of a Preventive Detention Order for six months ending in March, 1982, on grounds similar to those presently mentioned. All these considerations are destructive of the submission that there was *mala fides* on the part of the Respondent in making the impugned Order.

Ground (d) which was not argued, is general and cannot stand on its own. In any event, it can be readily subsumed under Ground (c) which I have found to be unsustainable.

To sum up, I would answer the question posed at the commencement of this judgment by enunciating the principles to be distilled from the various decisions of our courts as follows:

1. The subjective satisfaction of the Minister to detain a subject is not open to judicial review.
2. The vagueness etc. of the allegations of fact upon which a detention order is based does not relate back to the order of detention thereby vitiating it.

3. The mere fact that a subject has been detained under the law as to preventive detention following his acquittal in a Criminal Court does not *ipso facto* render his detention wrongful.

4. Exceptionally, the courts will review the order for preventive detention if:

   (a) *mala fides* is alleged; or,

   (b) it is alleged that the grounds of detention stated in the order do not fall within the scope and ambit of the relevant legislation; or,

   (c) it is alleged that a condition precedent for the making or the continuance of the order of preventive detention has not been complied with.

For the reasons stated, this application is dismissed.

Application dismissed.

Solicitors: *Balasundaram & Co.*

SET KON KIM v. OFFICER IN CHARGE, CERAS POLICE STATION

[O. Cr. J. (Mohamed Dzaiddin J.)
August 19-23 & 26, 1983]
[Kuala Lumpur – Criminal Application No. 9 of 1983]

Criminal Law and Procedure – Habeas Corpus – Extradition – Ad hoc extradition of fugitive criminal at request of foreign country – Authentication of foreign warrant – Speciality rule – Undertaking by foreign government – Whether alleged offence is extradition crime – Identity of applicant – Particulars of offences in recital of committal order – Whether extradition would be unjust or oppressive – Criminal Procedure Code, (F.M.S. Cap. 6), s. 365 – Extradition Ordinance, 1958, ss. 3, 3A, 5, 10 & 15

In this case the applicant had been ordered to be detained on a warrant of committal issued by the Magistrate to face ten charges which had been preferred against him under the State of Victoria Crimes Act, 1958. The applicant applied for a writ of *habeas corpus* under section 365 of the Criminal Procedure Code.

Held: (1) in cases of this nature there is power in the superior court to review the case as it appeared before the Magistrate not only to look at the evidence before the Magistrate but to consider whether any magistrate, properly applying his mind to the question, could reasonably have come to the conclusion that a strong and probable presumption of guilt has been made out which would justify the Magistrate in making the committal order.

(2) section 3A of the Extradition Ordinance, 1958 is intended to provide for an *ad hoc* extradition of a fugitive criminal at the request of a foreign country in respect of which there is no extradition treaty or any other arrangements with this country in complying with the provisions of the Extradition Ordinance 1958 as if there is in force in respect of that foreign country an order under section 3(1). The order made by the Magistrate for Home Affairs in this case under section 3A of the Ordinance was valid;

(3) in this case the documents were in one bundle and as such the authentication by the offical seal of the Attorney-General of Australia relates to all the annexed documents in the bundle. The mode of authentication by affixing just one official seal to all the annexed documents was sufficient. The foreign warrants and the depositions disclosing the alleged crimes were, therefore duly authenticated;

(4) in regard to the speciality rule, it is sufficient that there is an undertaking by the foreign government that the principle of speciality is guaranteed;

(5) the alleged offences of criminal breach of trust were extradition offences;

(6) the applicant in this case was properly and adequately identified in the committal proceedings;

(7) although there were insufficient particulars of the offences mentioned in the first recital to the committal order, this was a defect in form and and an order should be made to direct the committal Magistrate to make the necessary amendments;

(8) the court cannot grant a writ of *habeas corpus* to a person detained on a warrant of extradition under the Extradition Ordinance, 1958, on the ground that it will be unjust or oppressive to return him to the country seeking his return.

Cases referred to:

(1) *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons* [1976] 2 M.L.J. 156
(2) *Chua Han Mow* v. *Superintendent of Pudu Prison* [1980] 1 M.L.J. 219, 221
(3) *Re Low Kuan Meng* [1962] M.L.J. 265
(4) *Re Osman* [1954] M.L.J. 237
(5) *Public Prosecutor* v. *Ng Goh Weng* [1979] 1 M.L.J. 127
(6) *Yeap Hock Seng* v. *Minister for Home Affairs* [1975] 2 M.L.J. 279, 281

CRIMINAL APPLICATION.

Lee Lim Huat (*Yusuf Khan bin Ghows Khan* with him) for the applicant.

Zaki bin Tun Azmi (*John O'Hara* with him) for the respondent.

Cur. Adv. Vult

Mohamed Dzaiddin J.: On July 27, 1983 at Jalan Duta Magistrate's Court, Set Kon Kim, the applicant, was ordered to be detained at Balai Polis Lock-up Ceras on a warrant of committal issued by the Magistrate pending his extradition to Melbourne, Victoria, Australia, to face